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No. 88-1947

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTER-TRIBAL COUNCIL OF NEVADA, INC., PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner has standing to seek forfeiture of land, previously used for a federal Indian school, that the United States has conveyed to the State of Nevada.

2. Assuming that the petitioner has standing to sue, whether the State of Nevada violated the conditions to conveyance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Statutes:

Act of June 7, 1897, ch. 3, § 1, 30 Stat. 87	3
Act of Dec. 12, 1980, Pub. L. No. 96-514, 94 Stat. 2968	3
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	4
5 U.S.C. 702	7
Indian Appropriations Act of June 29, 1888, ch. 503, § 1, 25 Stat. 236	2-3
18 U.S.C. 1151	6
25 U.S.C. 443a	5, 7
28 U.S.C. 293a	2, 3-4, 5, 6, 8
28 U.S.C. 1331	7
28 U.S.C. 1362	7
Act of Jan. 25, 1887, 1887 Nev. Stat. ch. XII	2
§ 8	2

Miscellaneous:

H.R. Rep. No. 1147, 96th Cong., 2d Sess. (1980)	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 856 F.2d 1344, and the opinion of the district court dismissing the second amended complaint (Pet. App. 19a-27a) is reported at 592 F. Supp. 1297. The final opinion of the district court (Pet. App. 28a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988, and a petition for rehearing was denied on December 21, 1988 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the Secretary of the Interior's decision to transfer land once used for the Stewart Indian School to the State of Nevada pursuant to the provisions of 25 U.S.C. 293a. The district court held that petitioner lacked standing to challenge the Secretary's action and that even if the petitioner had standing, it would not be entitled to relief. The court of appeals affirmed.

1. In 1887, the Nevada legislature created an Indian School Commission and authorized the establishment of an Indian School in Ormsby County. Act of Jan. 25, 1887, 1887 Nev. Stat. ch. XII. The legislature further provided:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in trust for the benefit of such school, and in case the United States will accept of [*sic*] the lands so purchased and make appropriations for the support of such school, it shall be the duty of said commission to convey all lands purchased by them under the provisions of this Act to the United States, and turn over all property acquired under the provisions of this Act to the proper officers of the United States.

1887 Nev. Stat. ch. XII, § 8 (Pet. App. 72a-73a).

In 1888, the Indian School Commission purchased a 200-acre tract that it believed the United States could use as an Indian school site, and it accordingly executed the deed in favor of the United States. The Secretary of the Interior determined, however, that the land was unsuitable for a school site and refused to accept the deed. Shortly thereafter, the Secretary purchased a different tract, using county funds, through an unrestricted deed conveying the land from private parties directly to the United States in fee simple. Congress appropriated $25,000 for the establishment of the Stewart Indian School (Indian Appropria-

tions Act of June 29, 1888, ch. 503, § 1, 25 Stat. 236) and later reimbursed the county for the purchase price of the site. See Pet. App. 5a-6a, 37a-40a.

The United States maintained this site as the Stewart Indian School until 1980. That year, Congress determined that the school facilities were unsafe and that the needs of the 400 students attending the school (of whom only 27 were from Nevada) could be met at other facilities. Congress therefore closed the school. Act of Dec. 12, 1980, Pub. L. No. 96-514, 94 Stat. 2968. See H.R. Rep. No. 1147, 96th Cong., 2d Sess. 41-42 (1980). The State of Nevada and petitioner thereafter separately requested to receive the land pursuant to 25 U.S.C. 293a, which permits the Secretary of the Interior to transfer unneeded Indian school property to state or local governments. Pet. App. 6a-7a, 44a-48a.

On April 22, 1982, Nevada filed its application for transfer of the Stewart Indian School site under Section 293a, and on May 4, 1982, petitioner submitted an application for the site on behalf of the Nevada Indian tribes. The Secretary of the Interior informed petitioner that Section 293a did not permit transfer of the site to its organization. Pet. App. 6a-7a. On June 10, 1982, after the Secretary had proposed transferring the site to Nevada, petitioner filed a complaint seeking to enjoin the proposed conveyance. The complaint asserted that the land was held by the United States in trust for Nevada's Indians and that the Secretary had failed to comply with Section 293a's requirement that the United States obtain the consent of these "beneficial owner[s]" of the land prior to conveyance.[1] The complaint also contained a claim under the

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[1] Section 293a provides that "the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the

Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, based on the Secretary's alleged failure to follow the provisions of the Bureau of Indian Affairs (BIA) Manual dealing with Section 293a transfers. Pet. App. 9a.

2. The district court denied petitioner's motion for a preliminary injunction and the property was transferred to the State of Nevada in July 1982 (Pet. App. 8a, 9a). Petitioner then amended its complaint to add a cause of action under Section 293a's forfeiture provision, contending that the land should be returned to the United States because Nevada had failed to comply with the terms and conditions of transfer contained in the quitclaim deed (Pet. App. 9a).[2] The district court dismissed all of petitioner's claims except for the forfeiture action (*id.* at 19a-27a). Following trial on that action, the district court entered judgment for the Secretary and the State of Nevada, holding that petitioner lacked standing to seek a forfeiture because it was not a "former beneficial owner" (25 U.S.C. 293a) of the Stewart Indian School site. The district court ruled, in the alternative, that Nevada reasonably had complied with the terms and conditions of transfer. Pet. App. 28a-61a.

The court of appeals affirmed (Pet. App. 1a-17a). It agreed with the district court that petitioner lacked standing to sue under Section 293a's forfeiture provision because petitioner had not proved that it (or any of its con-

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United States in trust for an individual Indian or Indian tribe" (25 U.S.C. 293a).

[2] Section 293a provides in relevant part that if a grantee of land conveyed under that provision "fails for a period of one year to observe the provisions of the transfer agreement and the Secretary of the Interior fails to declare a forfeiture of the conveyance, the former beneficial owner * * * may petition the United States District Court for the district where the land is located to declare a forfeiture of the conveyance and to vest the title in the United States, in the same trust status as previously existed" (25 U.S.C. 293a).

stituent members) was a "former beneficial owner" of the land (Pet. App. 12a-14a). The court of appeals also ruled that petitioner lacked standing under 25 U.S.C. 443a, which permits the Secretary to transfer federally owned facilities to Indian tribes if such facilities "are situated on the lands of such tribe, band, or group or on lands reserved for the administration of its affairs * * *." The court concluded that the Stewart Indian School site had not been reserved for petitioner or its member tribes or for the administration of their affairs (Pet. App. 14a-15a).[3]

Finally, the court of appeals held that petitioner lacked standing to assert a challenge under the APA based on the Secretary's supposed failure to comply with agency procedures set forth in the BIA Manual for transfers of land pursuant to 25 U.S.C. 293a. The court concluded that since petitioner "has no rights protected by § 293a, it has no standing to protest the Secretary's alleged failure to properly implement that statute" (Pet. App. 15a-17a). In view of its decision on the standing issues, the court of appeals found it unnecessary to review the district court's determination that Nevada had reasonably complied with the terms of the quitclaim deed for the Stewart Indian School site (*id.* at 17a).

ARGUMENT

The court of appeals correctly concluded that petitioner has no legally cognizable interest in the Stewart Indian School land and therefore lacks standing to seek its for-

[3] The court of appeals observed that "[a]lthough an examination of the various complaints filed by [petitioner] does not reveal that it ever asserted a cause of action under section 443[a], we will nevertheless discuss this possibility because the record indicates that [petitioner] relied upon the section in its opposition to the federal defendants' motion to dismiss" (Pet. App. 10a).

feiture. The decision does not conflict with any decision of this Court or of any other court of appeals. Further review, accordingly, is not warranted.

1. Petitioner argues (Pet. 17-27) that it has standing to seek forfeiture of the Stewart Indian School land pursuant to Section 293a because petitioner and its members are "former beneficial owner[s]" (25 U.S.C. 293a) of that land. Petitioner reasons that the Nevada statute creating the Indian School Commission and authorizing the purchase of Indian school lands (see p. 2, *supra*) imposed an "implied trust" on the Stewart Indian School site for the benefit of petitioner and its members. The court of appeals correctly rejected that contention.

The Nevada statute states that "lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in trust for the benefit of such school" (p. 2, *supra*). As the court of appeals explained (Pet. 12a-14a), the land at issue here was not purchased under "this Act" and, accordingly, was never "conveyed to said Indian School Commission." The United States itself purchased the land in fee simple. Thus, no implied trust was created under the terms of the Nevada legislation. Indeed, even if an implied trust had been created, the Nevada statute does not designate petitioner or its members as beneficiaries of the trust. Instead, the trust would have been created "*for the benefit of such school.*" Thus, petitioner's argument that it and its members may seek forfeiture as "former beneficial owner[s]" is without mert.[4]

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[4] Petitioner also mistakenly argues (Pet. 19-27) that it is a "former beneficial owner" because the Stewart Indian School is "Indian country" within the meaning of 18 U.S.C. 1151. Section 1151, which defines "Indian country" for the purpose of federal criminal jurisdiction, has no relevance to the present dispute.

Petitioner also contends (Pet. 27-38) that it "has standing to pursue this action under 28 U.S.C. § 1331, 1362 and 25 U.S.C. § 443a." Sections 1331 and 1362 are provisions defining the jurisdiction of the federal district courts and do not, of course, confer standing. Section 443a, which permits the Secretary of the Interior to transfer to an Indian tribe "federally owned buildings, improvements, or facilities" in prescribed circumstances, is also inapposite.

As the court of appeals observed (Pet. App. 10a), petitioner's various complaints have never stated a claim based on Section 443a. In any event, Section 443a permits, but does not compel, the Secretary to transfer to an Indian tribe federal *facilities* which are no longer used by the federal government if those facilities are located on "lands of such tribe, * * * or on lands reserved for the administration of its affairs" (25 U.S.C. 443a). The court of appeals correctly recognized that the Stewart Indian School site "was never set aside by treaty or statute as Indian land" (Pet. App. 15a) and that it was not "reserved for the administration of the affairs of [petitioner's] member tribes" (*ibid.*). Indeed, the school's student body was composed principally of out-of-state students (*id.* at 13a). Thus, Section 443a does not give petitioner standing to challenge the transfer of the school facilities, let alone the underlying land.

Petitioner also contends (Pet. 38-46) that it has standing under the APA to challenge the Secretary's alleged failure to comply with the provisions of the BIA Manual. The court of appeals properly rejected that contention. The APA permits challenges to agency decisions by persons who have suffered legal wrong because of the agency action or who have been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. The BIA Manual sections that petitioner alleges the Secretary has violated implement Section 293a.

"Because [petitioner] has no rights protected by § 293[a], it has no standing to protest the Secretary's alleged failure to properly implement that statute" (Pet. App. 17a). Indeed, "[e]ven if the Council had surmounted the standing barrier, which it has not, there is a question whether it would still be barred from judicial relief for failure to exhaust administrative remedies" (*id.* at 17a n.1).

2. Petitioner also asks this Court to review the district court's alternative holding that petitioner failed to carry its burden under Section 293a's forfeiture provision of showing that Nevada had violated the provisions of the transfer agreement. The district court concluded that the trial testimony showed that Nevada had made reasonable efforts to protect and preserve the property. That question, which the court of appeals found unnecessary to address (Pet. App. 17a), turns on the particular facts of the case and would not warrant this Court's review even if petitioner had standing to raise it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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